(3)

Supreme Court, U.S.
FILED
JAN 10 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONRAD PETER,

Petitioner,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY TO BRIEF IN OPPOSITION

BRUCE J. ENNIS, JR.*
ANN M. KAPPLER
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

PAUL S. MINOR
MINOR, BENTON & GUICE
178 Main Street
Biloxi, Mississippi 39533
(601) 374-5151

JOEL H. HOLT
51 ABC Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

Counsel for Petitioner Conrad Peter

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 2
De Canas v. Bica, 424 U.S. 351 (1976) 4
Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983) 2, 3
Fillinger v. Foster, 448 So.2d 321 (Ala.), *cert. denied*, 469 U.S. 872 (1984) 7
Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910 (4th Cir.), *cert. denied*, 479 U.S. 914 (1986) 7
Hahn v. Ross Island Sand & Gravel, 358 U.S. 272 (1959) (*per curiam*) ..... *passim*
Lewis v. Modular Quarters, 487 U.S. 1226 (1988) .. 8
Logan v. Louisiana Dock Co., 541 So.2d 182 (La.), *cert. dismissed*, 110 S.Ct. 30 (1989) 7
Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624 (1983) 3
Phillips Chemical Co. v. Dumas Ind. School District, 361 U.S. 376 (1960) 8
Poche v. Avondale Shipyards, Inc., 339 So.2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction*, 434 U.S. 803 (1977) 6, 7
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) .. 4
Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947) 4
Sider v. Robin Temporary Service, 515 So.2d 1123 (La. Ct. App. 1987), *writ denied*, 519 So.2d 146 (La. 1988) 7
Smalls v. Blackmon, 269 S.C. 614, 239 S.E.2d 640 (1977) 7
Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980) ..... *passim*
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 6

STATUTES:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 905(a) ..... *passim*
Virgin Islands Workmen's Compensation Act, 24 V.I.C. Sec. 263a 5

TABLE OF AUTHORITIES—Continued

RULES: Page

Sup. Ct. R. 14.1(a) 8

OTHER AUTHORITIES:

4 A. Larson, Workmen's Compensation Law (1990) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-768

CONRAD PETER,

Petitioner,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY TO BRIEF IN OPPOSITION

This case presents an important question regarding the preemptive effect of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act") on tort remedies provided by States to their injured workers. The Third Circuit's conclusion that such tort actions are preempted, although state statutory compensation remedies are not, finds support in neither law nor logic. Indeed, the court of appeal's decision conflicts with this Court's decisions in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) and *Hahn v. Ross Island Sand & Gravel*, 358 U.S. 272 (1959) (*per curiam*). The court's decision is indicative of the widespread confusion among state and federal courts regarding the preemptive effect of LHWCA in cases falling within the "twilight zone" of concurrent state and federal jurisdiction. None of respondent's arguments supports denial of certiorari.

ARGUMENT

1. Respondent admits that state regulation in the admiralty area should not be struck down "absent a clear conflict with federal law." Brief in Opposition to Petition For Writ of Certiorari at 5 (hereafter "Opp."), quoting *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). Respondent cannot find this "clear conflict" in the language of the statute: LHWCA is entirely silent on the issue of preemption. At no time has Congress expressly prohibited States from applying their tort laws to LHWCA-covered workers injured in the twilight zone. Nor does respondent suggest that the conflict is evident in the Act's legislative history. *See Sun Ship*, 447 U.S. at 724-725 (recognizing as "noteworthy that in their discussion of advantages to employers under the 1972 amendments [to LHWCA], the bill Reports . . . do not mention pre-emption of state remedies"). Instead, respondent—like the Third Circuit—contends that such state tort actions are preempted because they allegedly would "obstruct" the purported purposes of the Act. Opp. 12. *See* 903 F.2d at 951; 36a.[1] Like the court of appeals, respondent is mistaken.

According to respondent, Congress created LHWCA to provide workers no-fault compensation in exchange for their relinquishment of *all* tort claims against their employers. *See* Opp. 12. Thus, so the argument goes, per-

---

[1] Respondent also asserts that permitting a state tort action against a worker's employer would "injure the purposes for which the twilight zone was created." Opp. 12. This assertion is unfounded even if one accepts respondent's notion of those purposes—"facilitating access to a compensation remedy." *Id.* Permitting a state tort remedy in no way interferes with the worker's access to compensation remedies, either federal or state. Since the injury occurred within the twilight zone, there is "concurrent jurisdiction." *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 309 (1983). Thus, the worker has access to LHWCA as well as the State's compensation scheme, which may or may not permit tort actions against his employer.

mitting Peter to bring his negligence action against HOVIC "destroys" the intended *quid pro quo*.[2] This argument fails. *First*, respondent cites no evidence supporting this purported "purpose" and there is none. Setting up such an exchange may, at least to some extent, have been the "design[]" of the Act. *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). But that begs the question whether Congress' design contemplated relinquishment of *state*, in addition to federal, tort remedies. *Second*, Congress' purpose in enacting LHWCA was quite simple: "to guarantee a federal remedy of a certain minimum size" to injured workers. 4 A. Larson, Workmen's Compensation Law § 89.71 at 16-406 (1990). *See Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 317-318 (1983); *Sun Ship*, 447 U.S. at 723. Permitting Peter to sue HOVIC under Virgin Islands tort law does not obstruct this clear congressional purpose; he retained access to a minimum recovery under LHWCA. *Third*, respondent completely ignores this Court's explicit holding that the *quid pro quo* to employers for giving workers' LHWCA coverage in the twilight zone of concurrent state and federal jurisdiction was "simply" the workers' surrender of a *federal* non-LHWCA, common-law remedy—"the longshoremen's unseaworthiness remedy." *Sun Ship*, 447 U.S. at 724.[3] Peter's recovery against HOVIC under Virgin Islands negligence law does not disrupt this intended balance.[4]

---

[2] Obviously, the Virgin Islands did not have this *quid pro quo* in mind with regard to HOVIC. Given the Territory's explicit rejection of the "borrowed servant" doctrine, HOVIC could not reasonably have understood that it obtained coverage for Peter under the Virgin Islands workmen's compensation statute in exchange for immunity from tort suits under Virgin Islands law.

[3] Thus, respondent is clearly wrong in arguing that "for injuries in the twilight zone in the Virgin Islands, HOVIC gains no *quid pro quo* and borrowed employees give up nothing." Opp. 12.

[4] Respondent contends that Peter's argument, if successful, "would rekindle the jurisdictional question anew" by causing workers and

Respondent's assertion that there is no support for Peter's claim that LHWCA does not nullify his state tort remedy is wrong, *see* Pet. 11-17 and pp. 4-7 *infra*, and misses the point. The issue is not whether the twilight zone "preserves" a worker's state negligence action (Opp. 12); the issue is whether LHWCA's extension into the twilight zone *clearly supplants* such an action. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State" and workmen's compensation schemes are an example. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Thus, in examining the preemption issue, it must be " 'assum[ed] that the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear* and *manifest* purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Neither the Third Circuit nor respondent has made this demonstration.

2. Respondent cannot explain away the conflict between the Third Circuit's decision and this Court's decisions in *Sun Ship* and *Hahn*. Respondent can find nothing in this Court's *Sun Ship* decision that indicates the Court meant to distinguish state workmen's compensa-

---

employers to litigate whether the injury occurred in the twilight zone or in wholly maritime areas. Opp. 11 n.7. But to the extent such litigation would result, it is encouraged under respondent's and the Third Circuit's interpretation of LHWCA as well. This Court has expressly recognized that benefits under state compensation laws may be superior to those available under LHWCA. *Sun Ship*, 447 U.S. at 724. Thus, to paraphrase respondent, "plaintiffs would argue that particular injuries occurred in the twilight zone and not in wholly maritime areas, in order to obtain the possibility of a [greater] state [compensation] remedy. Employers would argue the opposite." Opp. 11 n.7. Recognizing that the State may provide a *tort* remedy changes nothing. This is precisely because the state tort remedy, if recognized, is part of the state compensation scheme.

tion remedies from state tort remedies. Indeed, respondent simply ignores the extensive language in the decision making clear that the *Sun Ship* Court made no such distinction; to the contrary, the Court recognized that Congress did not intend Section 905(a) of LHWCA to exclude "remedies offered by other jurisdictions." 447 U.S. at 722 n.4. *See* Pet. 12-13. The Third Circuit's ruling fundamentally conflicts with the *Sun Ship* Court's holding that LHWCA's application in the twilight zone "supplements, rather than supplants" state law remedies. 447 U.S. at 720. Pursuant to *Sun Ship*, if the State legislature has not preempted state tort remedies against the worker's employer, then LHWCA (by virtue of its extension into the twilight zone) certainly does not preempt such remedies.

Respondent's attempt to dismiss the clear conflict with *Hahn* is even more strained.[5] According to respondent, *Hahn* can be distinguished because the twilight-zone state tort action against the employer expressly permitted in *Hahn* "was statutorily authorized by, and was in furtherance of, the state's workers' compensation law." Opp. 8. This is no distinction. Peter's negligence action against HOVIC is statutorily authorized as well. *See* 24 V.I.C. § 263a. *See also* Pet. 16 n.14. And the Virgin Islands legislature has explicitly determined that such actions are in furtherance of its workers' compensation law, for it adopted the statutory provision (as part of its workmens' compensation statute) allowing tort actions specifically to overrule a Third Circuit decision interpreting its compensation statute to foreclose such actions. *See* 903 F.2d at 939; Pet. App. 7a-8a. Respondent's suggestion that Peter's tort action serves no legitimate governmental purpose (Opp. 8 n.4) is nothing short of an unprecedented invitation for courts to decide which elements of a State's

---

[5] Respondent is at a loss to find evidence that the *Hahn* Court endorsed the state tort action there as a "penalty" to the employer. *See* Opp. 8.

compensation scheme it believes are "sensible" enough to survive preemption.[6] Congress clearly did not intend this flagrant abridgement of States' legitimate power and authority. *See* Pet. 16-17.

Respondent simply ignores the fact that the *Hahn* Court's holding turned solely on the twilight zone nature of the case. According to the Court, "[s]ince th[e] case [w]as within the 'twilight zone,' it follows . . . that nothing in the Longshoremen's Act . . . prevents recovery." 358 U.S. at 273. Pursuant to *Hahn*, in the twilight zone, LHWCA does not bar a worker's "claim under state law," *id.*; in particular, the Act does not bar a tort action against his employer. *Id.* The Third Circuit's decision cannot be squared with *Hahn*.

3. Respondent's attempts to dispell the conflicts and confusions among federal and state courts regarding the preemptive effect of LHWCA in twilight-zone cases are equally unavailing. *First*, respondent articulates no difference between this case and the Louisiana Supreme Court's decision in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction*, 434 U.S. 803 (1977), that would lead anyone

---

[6] Respondent's attempt to argue that Peter's negligence claim against HOVIC is not part of the Virgin Islands' compensation scheme makes no sense. *See* Opp. 8 & n.4. The argument seems to be based upon the fact that LHWCA does not permit such a claim, where as in *Hahn* both the state compensation statute and LHWCA subjected an employer to tort litigation if he failed to secure compensation. The fact that both the State and Congress made similar policy decisions in their compensation schemes in the *Hahn* situation does not preclude a finding that a State may make a policy decision different from Congress and still have it considered part of its workmen's compensation scheme. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [State] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.").

to believe that the state supreme court would agree with the Third Circuit on the preemptive effect of Section 905(a) of LHWCA.[7] Respondent's contention that *Poche* "has had practically no precedental effect" ignores the Louisiana Supreme Court's reliance on *Poche* less than two years ago in a LHWCA preemption case. *See Logan v. Louisiana Dock Co.*, 541 So.2d 182, 188 (La.), *cert. dismissed*, 110 S.Ct. 30 (1989). Thus, there is a direct conflict between state Supreme Courts on the preemptive effect of LHWCA on workers' state tort remedies. *Compare Fillinger v. Foster*, 448 So.2d 321, 326 (Ala.), *cert. denied*, 469 U.S. 872 (1984), and *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977).

Second, respondent admits that there is a direct conflict between the holdings of the Fourth Circuit and those of the Fifth Circuit regarding the preemptive effect of LHWCA on state provisions regarding a worker's suit against his "statutory employer." *See* Opp. 12-15 n.9.[8]

---

[7] The Louisiana Court of Appeals' decision in *Sider v. Robin Temporary Service*, 515 So.2d 1123 (La. Ct. App. 1987), *writ denied*, 519 So.2d 146 (La. 1988), does not contradict the Louisiana Supreme Court's decision in *Poche*. Contrary to respondent's claim, *Sider* was *not* clearly "a twilight zone case if there ever was one." Opp. 14 n.8. As the court's opinion repeatedly makes plain, "at the time of [the worker's] injury he was cleaning a barge *located in navigable waters*." 515 So.2d at 1130 (emphasis added); *see also id.* at 1126 (barge was "floating on the Mississippi River"); *id.* at 1128 (same). Injuries on navigable waters are *maritime* cases, not twilight zone cases. And LHWCA applies in such cases. Thus, the fact that the court of appeals rested its decision on statutory grounds, rather than on constitutional grounds, simply comports with proper judicial decision-making. It does not signal that this was a twilight-zone case.

[8] Respondent's attempt to distance *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir.), *cert. denied*, 479 U.S. 914 (1986), from this case rests on respondent's assumption that Section 905(a) preempts state tort remedies against a worker's employer and therefore conflicts with Virgin Islands law. *See* Opp. 14 n.9. But, as Peter has demonstrated, there is no conflict with

Only this Court can resolve these conflicts and provide the necessary guidance to the state courts and lower federal courts. This case presents an ideal vehicle to accomplish that end.

4. Perhaps because its arguments on the merits are so weak and the conflicts with decisions of this Court and among other courts are obvious, respondent seeks to convince this Court that the decision below has no practical effect because, allegedly, only the Virgin Islands has rejected the "borrowed employer" concept. Opp. 15-16. But the Third Circuit's decision is not confined to state tort actions against borrowed employers. The court of appeals stated its holding broadly:

> "where an employer has obtained workmen's compensation coverage for its LHWCA employee under both LHWCA and the state or territorial statute, § 905(a) and the Supremacy Clause bar a state or territorial tort recovery against the employer."

903 F.2d at 953; Pet. App. 36a. Thus, the holding pertains to any State's tort action—of any description—against a LHWCA worker's employer, whatever the nature of the employer's relationship to his employee (*e.g.*, "statutory employer," subcontractor, contractor, contractual employer, or borrowing employer).[9]

LHWCA. Moreover, even accepting respondent's view, the same *quid pro quo* that respondent proffers as the purpose of the Act for "borrowed employers" would apply to "statutory employers" as well. Thus, there can be no distinction between *Garvin* and this case on that ground.

[9] Even if the decision were viewed as confined to the Virgin Islands, it is passing strange to suggest that the more narrow issue is unlikely to repeat itself (*see* Opp. 16) when the Virgin Islands is an important maritime jurisdiction and therefore LHWCA cases arising there are far from infrequent. As to the general preemption issue presented by this case, the dissenting opinion in *Lewis v. Modular Quarters*, 487 U.S. 1226 (1988), makes plain that issues (and conflicts) regarding the preemptive effect of LHWCA are recurrent.

5. Finally, respondent suggests that this case may not present the issue raised in the Petition because the Third Circuit assumed, but did not hold, that LHWCA applies to the Virgin Islands, even though respondent maintains that the Act is applicable and notes that the court of appeals expressed a similar opinion. *See* Opp. 16. Respondent asserts that "if certiorari were granted, petitioner's first argument on the merits would have to be that [LHWCA] does not apply to the Virgin Islands." *Id.* 17. This assertion is strange, at best, since Peter did not seek certiorari on this issue and it is well-established that this Court does not address issues on which it has not granted certiorari. Sup. Ct. R. 14.1(a). *See, e.g., Phillips Chemical Co. v. Dumas Ind. School District*, 361 U.S. 376, 386 n.12 (1960).[10] The LHWCA preemption issue is clearly presented; nothing prevents this Court from reaching and resolving it.

The proposition that this Court should decline to address a clearly presented, important question of constitutional law in a case in which the court of appeals ruled incorrectly and in conflict with this Court's prior decisions, thereby infringing on States' rights—especially where the case offers an opportunity to resolve other closely related conflicts and to provide sorely needed guidance—simply because the lower court *might* have ruled on other grounds, finds no support in this Court's jurisprudence.[11]

---

[10] Respondent has consistently argued that the issue is not jurisdictional; and the court of appeals explicitly held that it is not. *See* Pet. App. 41a.

[11] Contrary to respondent's contention, in the concededly unlikely event the Third Circuit decides at some later date that LHWCA does not apply to the Virgin Islands, this Court's decision in this case would *not* be rendered "without any effect." Opp. 17 n.11. As noted above, the Third Circuit's holding, and thus this Court's holding, was not confined to tort actions sanctioned by the Virgin Islands.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
ANN M. KAPPLER
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

PAUL S. MINOR
MINOR, BENTON & GUICE
178 Main Street
Biloxi, Mississippi 39533
(601) 374-5151

JOEL H. HOLT
51 ABC Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

Counsel for
Petitioner Conrad Peter

* Counsel of Record

January 1991